IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 338 OF 1991

1. Smt. Chandrabhaga W/o Ganpat Kirve Teli, age 65 years, Occ: Household, resident of Karmala.

2. Dattatraya Ganpat Kirve, age 48 Occ. Service, Resident of Baramati.

3. Raghunath Ganpat Kirve, age 40 Occ. Service, Resident of Teli Galli Karmala.

4. Sou. Indubai W/o Jagannath Dalvi age 45, Occ. Household, resident of Karmala.

5. Sou. Shakuntala Damu Dalvi age 32, Occ. Household, resident of Baramati.

6. Smt. Suman Raghunath Wagulkar age 27, Occu. Household work, Resident of Teli Galli, Karmala.

7. Sou. Baby Tanaji Teli, age 19 Occ. Household, r/o Chimangaon, Tal. Koregaon, District Satara. .. Appellants (Org. Defts.)

Vs.

1. Kantilal Dharsibhai Desai age 49, Occ. Trader, R/o Somwar Peth, Barsi.

2. Laxmikant Dharsibai Desai age 40, Occupation Trader, resident of Somwar Peth, Barsi.

3. Suryakant Dharsibhai Desai age 37, Occ. Trader, resident of Somwar Peth, Barsi.

4. Chandrakant Dharsibhai Desai age 37, Occupation Trade, resident of Somwar Peth, Barsi.

5. Ramdas Ganpat Kirve, age 22 yrs. Occupation Service, resident of Pune.

6. Bhagwan Ganpat Kirve, age 37 yrs. R/o 327, S.R.P.F. Group No.4, B Company, Nagpur. .. Respondents

(Repdts. Nos.1 to 4 Org.Plffs.)
(Repdts. Nos.5 & 6 Org.Deft.Nos. 1(e) & 1(d) respectively.

Mr. S.G. Kudle for appellants.
Mr. S.B. Deshmukh h/f Mr. A.V. Anturkar for Respondent Nos.1 to 4.
Appeal dismissed against Respondent No.5 for non prosecution by order dated 6/8/93.
Respondent No.6 served (absent).

CORAM: B.H. MARLAPALLE, J.

Date : December 22, 2005.

ORAL JUDGMENT:

1. This Second Appeal arises from the Judgment and Order dated 3/7/1984 passed by the learned Civil Judge, Junior Division at Karmala in Solapur District in Regular Civil Suit No.222 of 1975. The learned Judge was pleased to decree the suit for possession and mesne profits in respect of the suit house no.440 under Municipal Council, Karmala and a plot of land

admeasuring 40 x 20 ft. This decree came to be confirmed by the learned Additional District Judge at Solapur vide his Judgment and Order dated 28/2/1990 in Civil Appeal No.558 of 1984. The substantial questions of law framed while admitting this appeal are as under:-

(a) Whether both the courts below have committed an error by misconstruing the alleged Sale Deed which was not specifically pleaded in the Plaint by the Plaintiffs?

(b) Whether both the courts below have committed an error by treating the Mortgage Deed in respect of the suit property, whereas actually the same was in respect of some other property?

2. The appellants were impleaded as defendants in R.C.S. No.222 of 1975 filed by the present respondents-plaintiffs. As per the plaintiffs the suit property was handed over to their father Shri Dharsibhai son of Jivan Desai by Shri Eknath Savlaram

Kirve Teli vide Mortgage Deed dated 17/10/1942 (Exh.153) and Dharsibhai's name came to be entered as the owner of the property in the year 1958 by the Municipal Council. On the demise of Dharsibhai, the suit property was kept as a joint family property in the name of all the plaintiffs and for some reasons they had to be away from Karmala for few years. As per the plaintiffs on or about 12/11/1974 when they entered the suit property they saw that the defendants had forcibly acquired possession of the suit property and erected a temporary shed admeasuring 40 x 8 ft, and on their request to remove the shed and also vacate the suit property, the defendants claimed that the suit property was their ancestral property. The plaintiffs issued a legal notice dated 27/12/1974 (Exh.65) calling upon the defendants to remove their encroachment from the suit property. The defendants replied the said notice on 3/4/1975 (Exh.66) and they claimed that the suit house property was their ancestral property and they were not encroachers. They also claimed that they were in possession of the suit property for more than 50 years and it was the property of a joint Hindu family. The plaintiffs, therefore, approached the court for seeking possession

of the suit house property and also the mesne profits. The defendant no.1 filed his Written Statement at Exh.17, whereas the defendant no.2 filed his Written Statement at Exh.18. The defendant no.1 claimed to be son of Rama Kirve and the brother of Vithal Kirve, whereas the defendant no.2 is the son of Ganpat Kirve, the defendant no.1. On the demise of the defendant no.1, his four sons, four daughters and widow were brought on record as the defendants. In the Written Statement while the defendants reiterated that the suit house was their ancestral property and they were in possession of the same for more than 50 years, they claimed to be LRs of Eknath Savlaram who had handed over the suit property to the plaintiffs' late father vide the Mortgage Deed at Exh.153. This plea of succession was not, however, taken up in the reply Exh.66 to the legal notice issued by the plaintiffs. On behalf of the plaintiffs, plaintiff no.1 Kantilal (P.W.1), Ghanashyam Gandhi (P.W.2), Vallabhadas Desai (P.W.3), Vithal S/o Kisan Veer (P.W.4), Hiraman Savlaram Nirmal (P.W.5) and Dattatraya Vinayak Pandit (P.W.6) came to be examined. On the other hand, Chandrabhaga Kirve (D.W.1), Chandkhan Pathan (D.W.2) were the only witnesses examined on behalf of the

defendants. The learned Judge of the trial court considered the oral and documentary evidence brought on record by the respective parties and held that the plaintiffs had proved their title to the suit property, the plaintiffs proved that on 12/11/1974 they were dispossessed unlawfully from the suit property by the defendants and the defendant no.1 refused to deliver the possession of the suit property to the plaintiffs on 3/4/1975. On a specific issue framed, the trial court held that the defendants failed to prove that they were in possession of the suit property continuously, openly and peacefully for more than 20 years and, therefore, the plaintiffs were entitled to the possession of the suit property. In the appeal the Lower Appellate Court, on assessment of the evidence available on the record, held that the plaintiffs had proved their title to the suit property and that they were forcibly dispossessed by the defendants from the same in the year 1974 and, therefore, the decree passed by the trial court for possession was confirmed.

3. Mr. Kudle the learned counsel for the defendants submitted that the Mortgage Deed at Exh.153

was not a sale transaction, the plaintiffs failed to prove their title to the suit property, the possession allegedly given to the plaintiffs' father was not proved and in any case it being a joint family property, possession given by any one family member would not be binding on the other members of the family. The learned counsel also submitted that the defendants had even otherwise raised a plea of ownership by adverse possession and the trial court failed to frame and decide such an issue specifically. As Mr. Kudle the learned counsel for the defendants the suit was required to be remanded for fresh trial on the issue of ownership by adverse possession. He also pointed out that the suit property was claimed to be house no.440, while the property covered by the Mortgage Deed at Exh.153 was ostensibly house no.398 and this would go to show that the plaintiffs did not have a valid title in law to the house no.440 and on this ground alone the suit was required to be dismissed.

4. The issue of the description of the suit property is required to be dealt with at the threshold. The Lower Appellate Court also noted that

the property covered by the Mortgage Deed dated 17/10/1942 at Exh.153 is house no.398 and not house no.440 which is claimed to be the suit property. But the Lower Appellate Court proceeded to consider the boundaries of the suit property i.e. house no.440 and house no.398 as set out in the plaint as well as the Mortgage Deed respectively and it noted that house no.440 and house no.398 were one and the same. This finding on perusal of the plaint as well as the Mortgage Deed at Exh.153 requires to be confirmed and thus it cannot be accepted that the suit property was not covered by the Mortgage Deed at Exh.153.

5. It would be pertinent to note the following contents of the Mortgage Deed at Exh.153 so as to appreciate the rival submissions made by the respective parties. The true translation of the said contents of the Mortgage Deed at Exh.153 reads as under:-

> "....Thus the aforesaid land enclosed within the aforesaid boundaries togetherwith the tinsheet structure, stones, earth, and land beneath the same and togetherwith all the

appurtenances thereto has been given in your possession today by giving in writing the possessory mortgage. Though there is no interest on the amount and though there is no rent for the land and though the interest and the income are made even; I shall give the principal amount within three years from today and shall get released (redeemed the mortgage) the land and if any amount is remained to be paid then vahiwat (management) shall be carried out as aforesaid and if do not wish to do so, then the aforesaid land shall be got sold (disposed of) through the Court and the entire amount shall be got recovered and if any amount is fallen short, then I shall personally give the same. I shall pay the Mun. Tax. If any obstruction is caused to the vahiwat then I shall ward off the same. I shall not put you to bear and suffer any expenditure and loss. As the payment of amount is as aforesaid, the same is agreed. Hence no dispute is left about the payment. This is duly given in writing."

5A. It is a deed signed between Shri Dharsibhai Jivan Desai and Eknath Savlaram Kirve Teli and it was called as "Tabe Gahan Patra" (Mortgage Deed). It confirms that the possession of the house with Municipal No.398 was handed over to Shri Dharsibhai Desai by Eknath Savlaram on 17/10/1942 itself and in lieu of interest on the amount of Rs.200/-, Dharsibhai was not required to pay the rental charges. The mortgage period was three years and it was clearly stated that if during this period of three years Eknath could not return the amount of Rs.200/-, Dharsibhai was entitled to retain the property as an owner or dispose it off to recover the amount lent to Eknath.

6. It has come in the evidence that the tax receipts produced at Exh.69 to 76 which pertain to the period from 1950 to 1958 were in the name of Eknath Savlaram and the tax amount was paid by Dharsibhai as an occupant of the suit house. Obviously, the suit house was not entered in the name of Dharsibhai till the year 1958, when Kantilal made an application in the year 1958 on the demise of his father.

Consequently notice no.121 dated 1/11/1958 was issued by the Municipal Council and defendant no.1 Ganpat or his son defendant no.2 did not take any objection in reply to the said notice. However, Vithal, the brother of defendant no.1, by his written application dated 13/11/1958 raised an objection to enter the name of Kantilal Dharsibhai Desai as the owner. Vithal Rama Kirve claimed in his reply at Exh.118 submitted to the Municipal Council that the suit house was the ancestral property of his family and Eknath was his cousin who was misled by the money lender Dharsibhai by obtaining Mortgage Deed. Vithal further claimed that on the demise of Eknath, there was no other LR except himself and, therefore, he objected to enter the name of Kantilal Desai as the owner of the suit house. Though Vithal was not impleaded as one of the defendants, at the same time he never applied to the trial court for being impleaded as a necessary defendant. On the other hand, D.W.1 Chandrabhagabai stated in her examination-in-chief that Vithoba was the brother of her husband Ganpat and her father-in-law's name was Rama. She further stated that Rama had one brother by name Savla and Eknath, the mortgager of the suit house was the son of

Savlaram. On the basis of this relationship she claimed that the suit house was the joint family property. In the cross-examination, she admitted that she did not know the business of Vithoba Rama. She could not place on record any evidence to show that Savlaram, the father of Eknath, was the brother of Rama and even D.W.2 Chandkhan Pathan was of no assistance in this regard. The onus of proving that (a) Rama was the brother of Savlaram and (b) the suit house remained as joint property between Savlaram and Rama was entirely on the defendants on the face of the Mortgage Deed at Exh.153, having been proved by the plaintiffs and this burden was not discharged by the defendants. In the Written Statements filed by the defendants, they did not take the plea of ownership by adverse possession as was sought to be placed before this court for the first time. They claimed that they were the owners of the suit property and the Mortgage Deed at Exh.153 was signed by an unauthorised family member and it was not binding on the defendants. The trial court rightly held that the defendants could not prove that they were in possession of the suit property continuously, openly and peacefully for more than 20 years because the tax receipts at Exhs.83 to

101 placed on record were in the name of the plaintiffs and the suit house was all along standing in the name of the plaintiff no.1. Witness Vithal Veer (P.W.4) had stated before the trial court that he had purchased the property from plaintiff no.1 in 1950 and the same is to the South side of the suit premises and he emphatically stated that from 1950 onwards he had seen the plaintiffs' possession over the suit property. He stated that one Gokuldas was managing the plaintiffs' property at Karmala and there was an Adat shop of Vithaldas Shah in the suit property which was run by Vithaldas Shah between 1961-65 and after 1965 plaintiffs had again continued their possession. P.W.5 Hiraman Savlaram Nirmal - Shop Inspector attached to the Karmala Municipality, stated that licence at Exh.138 was issued in the name of Vithaldas Shah for an Adat shop on 12/10/1962. The other documents brought on record by way of sale deeds at Exhs. 150, 151, 152, 154 and 155 while describing the boundaries of the properties covered by these respective conveyance deeds, there is a reference to the suit property held by either Eknath Savlaram or subsequently Dharsibhai Desai. The defendants did place on record a succession certificate issued by a competent court, as the successors of Eknath.

7. On the issue raised by the learned counsel for the defendants that there was no sale deed in respect of the suit house brought on record by the plaintiffs, it requires to be noted that by the above reproduced contents of the Mortgage Deed at Exh.153, it was clear that the suit house was to remain as the property of Dharsibhai Desai on the failure of Eknath Savlaram to return the consideration of Rs.200/- within a period of three years from 17/10/1942.

8. Thus, both the courts below have examined the oral and documentary evidence and recorded concurrent findings regarding the title of the plaintiffs to the suit house and dismissed the claim of the defendants that they either had a title to the property or they were in possession of the same for over 20 years. In the absence of a legal title to the suit house, their possession was by way of an encroachment and obviously they erected a temporary shed without any authority over the suit property. The courts below did not fall in any error in appreciating the evidence placed on record and the plaintiffs' claim has been rightly allowed as being the lawful owners of the suit house. The substantial questions of law referred to

hereinabvoe are, therefore, required to be answered against the defendants and their challenge to the decree passed by the trial court and confirmed by the Lower Appellate Court is devoid of merits.

9. In the premises, this appeal fails and the same hereby dismissed with costs.

10. Mr. Kudle, the learned counsel for the defendants, made an oral application for continuing the status quo for a period of eight weeks. The learned counsel for the plaintiffs has opposed the said prayer. Having regards to the fact that the defendants have remained in possession for the last about 30 years or so over the suit property, the status quo as at present shall be continued for a period of four weeks from today.

11. Certified copy is expedited.

(B.H. Marlapalle,J.)